SUPREME COURT, U. S.

NOV 28 1973

MICHAEL RODAK, JR., CLERK

No. 72-1637

In the Supreme Court of the United States

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE MAGNAVOX COMPANY OF TENNESSEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COMEN,
Deputy Associate General Counsel,
MARION GRIFFIN,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
A. The Board's decision	2
B. The court of appeals decision	6
Summary of argument	7
Argument	10
The Board properly concluded that the collective bargaining representative may not waive the employees' right to distribute union literature during non-working time in non-working areas of the plant	10
Conclusion	21

CITATIONS

Cases:

Armco Steel Corp. v. *National Labor Relations Board*, 344 F. 2d 621	6, 16
Ford Motor Co. v. *Huffman*, 345 U.S. 330	12
Gale Products, 142 NLRB 1246, enforcement denied, 337 F. 2d 390	5, 16
General Motors Corp., 147 NLRB 509	16
Great Lakes Carbon Corp. v. *National Labor Relations Board*, 360 F. 2d 19	19
H. K. Porter, Inc. v. *National Labor Relations Board*, 397 U.S. 99	18
Int'l Assoc. of Machinists v. *National Labor Relations Board*, 415 F. 2d 113	17

327-174—72——1

Cases—Continued

	Page
J. I. Case Co. v. *National Labor Relations Board*, 321 U.S. 332	11
McDonnell Douglas Corp. v. *National Labor Relations Board*, 472 F. 2d 539	18
Mason and Hanger-Silas Mason Co. v. *National Labor Relations Board*, 405 F. 2d 1	20
Mastro Plastics Corp. v. *National Labor Relations Board*, 350 U.S. 270	8, 11, 12, 13
Meat and Highway Drivers Local 710 v. *National Labor Relations Board*, 335 F. 2d 709	19
National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U.S. 105	17
National Labor Relations Board v. *Erie Resistor Corp.*, 373 U.S. 221	14, 20
National Labor Relations Board v. *Item Co.*, 220 F. 2d 956, certiorari denied, 350 U.S. 836	11
National Labor Relations Board v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702	8, 12, 13, 14, 17
National Labor Relations Board v. *Rockaway News Co.*, 345 U.S. 71	19
National Labor Relations Board v. *Truck Drivers Union*, 353 U.S. 87	20
National Labor Relations Board v. *United Aircraft Corp.*, 324 F. 2d 128, certiorari denied, 376 U.S. 951	17–18
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	7, 10
Steele v. *Louisville & N.R. Co.*, 323 U.S. 192	12
Stoddard-Quirk Mfg. Co., 138 NLRB 615	18
Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448	12
Timken Roller Bearing Co. v. *National Labor Relations Board*, 325 F. 2d 746, certiorari denied, 376 U.S. 971	11
Truck Drivers and Helpers, Local 568 v. *National Labor Relations Board*, 379 F. 2d 137	12

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

	Page
Section 1, 29 U.S.C. 151	9, 11, 15
Section 7, 29 U.S.C. 157	2, 5, 6, 7, 9, 10
Section 8(a)(1), 29 U.S.C. 158(a)(1)	2, 5, 10
Section 9(a), 29 U.S.C. 159(a)	11

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1637

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE MAGNAVOX COMPANY OF TENNESSEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13-15)[1] is reported at 474 F. 2d 1269. The decision and order of the National Labor Relations Board (Pet. App. 18-49) are reported at 195 NLRB 265.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1973. The petition for a writ of certiorari was filed on June 6, 1973, and was granted on October 9, 1973 (A. 147). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "Pet. App." refers to the appendix of the petition for certiorari. "A." refers to the separate appendix to the briefs.

QUESTION PRESENTED

Whether a provision in a collective bargaining agreement that bars the distribution of union literature during non-working hours in non-working areas of the plant impermissibly abridges the employees' right to make such distribution, which is safeguarded by Section 7 of the National Labor Relations Act.

STATUTE INVOLVED

The National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), provides, in pertinent part:

> Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *.
>
> Section 8(a). It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *.

STATEMENT

A. THE BOARD'S DECISION

The International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC and its Local 796 first became the collective bargaining representative of the Company's employees in December 1954 (Pet. App. 32; A. 11–12, 135). At that time, the Company was main-

taining a rule prohibiting employees from distributing literature on all Company property, including parking lots and other non-work areas (Pet. App. 19, 32–33; A. 12–13, 30–31).[2]

In the initial contract negotiations, the Union proposed that the plant rules should be made a part of the contract. The Company opposed this proposal as a limitation on its ability to promulgate rules, and the Union ultimately agreed to a contract provision authorizing the Company to issue rules for the "maintenance of orderly conditions on plant property," provided the rules were not "unfair" or "discriminatory" (Pet. App. 33–34; A. 14, 16–17, 23, 135a). The contract also provided that bulletin boards would be made available for the posting of union notices, subject to the Company's right to reject "controversial" notices (Pet. App. 34; A. 23–24, 135–135a).

All subsequent contracts have contained similar provisions (Pet. App. 19–20, 34–35; A. 25–30, 125). The Company has continued throughout this 16-year period to maintain and enforce its rule prohibiting employees from distributing literature in non-working areas during non-working time (Pet. App. 19–20, 36; A. 30–32, 40–42, 57–58).[3] In 1956, the Union complained to the

---

[2] The Company's employee handbook provided, "'You are asked to refrain from distributing notices or handbills in the parking lots or on other Company property'" (Pet. App. 32); A. 13, 31, 130). Although the Company stopped distributing the handbook to employees at about the time of the Union's certification, it has continued to maintain and enforce the no-distribution rule (A. 38–39, 46–48, 127).

[3] Exceptions to the rule were made for charity drives and for the distribution of Company publications (Pet. App. 37; A. 30–32, 55–56, 58, 83–84, 91, 102).

Company that employees opposed to the Union were distributing literature urging decertification of the Union in a forthcoming election, while employees seeking to distribute a pro-union handbill had been driven off Company property by a plant guard (Pet. App. 35; A. 18, 20–21, 133). The Company replied that "* * * any action by any employee in distributing handbills on Company property was strictly without authorization and in violation of Company rules" and that supervisors would be instructed to stop employees from engaging in this practice immediately (Pet. App. 36; A. 20–22, 134).

Except for its 1956 complaint, the Union acquiesced in the no-distribution rule and distributed union literature at the entrances of the Company's property rather than on the premises (Pet. App. 36–37; A. 53–54, 56, 65, 70–73, 77–78, 81, 99–100, 103, 128). However, on May 21, 1970, the Union challenged the validity of the rule in the course of requesting permission to distribute a union leaflet at the timeclock (Pet. App. 38; A. 55).* On June 25, 1970, the Union formally requested in writing that the Company revoke its no-distribution rule to permit employee distribution in non-working areas during non-working time (Pet. App. 38; A. 121). The Company refused both requests, adhering

*The president of Local 796 testified that the Union had not previously asserted the right of employees to distribute union literature on plant premises because "[w]e knew the Company's position and we felt it was futile to say anything about it" (A. 94). He further testified that the Union challenged the no-distribution rule after it was advised at a district council meeting in the spring of 1970 that there was a legal right to engage in on-premises distribution (A. 96).

to the no-distribution rule and the contract provision authorizing it to make rules that are not unfair or discriminatory (Pet. App. 38; A. 9, 55, 122).

The Union filed charges and the Board, interpreting the collective bargaining agreement in the light of the bargaining history, found that the Union had acquiesced in the Company's no-distribution rule (Pet. App. 19–20). The Board held, however, that the right of employees, under Section 7 of the National Labor Relations Act, to select or reject a collective bargaining representative and to communicate fully with respect to that choice is not subject to waiver by the collective bargaining representative, and thus that the Company violated Section 8(a)(1) of the Act by enforcing its overly broad rule (Pet. App. 20–22). The Board followed its earlier decision in *Gale Products*,* where, balancing the interference with the employees' statutory rights against any legitimate reasons for upholding the waiver, it concluded that "an unlimited contractual prohibition against union solicitation and distribution would unduly hamper the employees in exercising their basic rights under the Act" (Pet. App. 21; 142 NLRB at 1249). The Board added:

> Their place of work is the one location where employees are brought together on a daily basis. It is the one place where they clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees. * * * [*ibid.*].

---

* 142 NLRB 1246, enforcement denied, 337 F. 2d 390 (C.A. 7).

The Board declined to adopt the remedy it ordered in *Gale Products*, which would have protected only the employees' right to distribute literature other than on behalf of the incumbent bargaining representative (Pet. App. 22–23). It found no statutory basis for affording more protection to "employees who wish to exercise their Section 7 right to *reject* [rather than] * * * to *support* a union representative" (Pet. App. 23). Accordingly, the Board ordered the Company to cease and desist from maintaining or enforcing any rule that prohibits employees from distributing literature in nonworking areas during non-working time on behalf of any labor organization, relating to the selection or rejection of a bargaining representative, or relating to other matters relevant to the exercise by employees of their Section 7 rights (Pet. App. 25).

B. THE COURT OF APPEALS DECISION

The court of appeals held that the Board's factual findings were supported by substantial evidence on the record as a whole (Pet. App. 15),[6] but adhered to its previous ruling[7] that "the bargaining representative has authority to waive on-premises distribution rights of the employees at least in the absence of spe-

[6] Thus, the court rejected the Union's contention that it had not acquiesced in the Company's no-distribution rule by entering into and maintaining a contract provision authorizing the Company to issue rules and regulations while the no-distribution rule remained in effect (Pet. App. 14–15).

[7] *Armco Steel Corp.* v. *National Labor Relations Board*, 344 F. 2d 621 (C.A. 6).

cial circumstances not present here" (Pet. App. 15). It therefore denied enforcement of the Board's order.

SUMMARY OF ARGUMENT

Section 7 of the Act guarantees to employees the right "to self-organization, to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing" as well as the right "to refrain from any or all of such activities." This guarantee encompasses the right to make a free choice respecting the selection or retention of a bargaining representative, and to communicate freely concerning that choice. Because the plant is the place where employees can most readily exchange views and information about their choice of a bargaining representative, a ban on union solicitation or on the distribution of union-related literature by employees at the plant during non-working time "must be presumed to be an unreasonable impediment to self-organization" unless the employer can demonstrate that "special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 801, 803–804, n. 10. The Company made no attempt to demonstrate such special circumstances justifying its blanket no-distribution rule here. Rather, the Company contended that the Union had waived the employees' Section 7 rights by acquiescing in the rule. The Board correctly rejected this contention on the ground that the rights of free choice and expression guaranteed employees in the Act outweigh any legitimate reason for uphold-

ing a waiver of those rights by the collective bargaining representative.

As the employees' representative, the Union is authorized to engage in collective bargaining on their behalf and to waive certain rights—for example, the right to strike. Such waivers rest on the "premise of fair representation" and are subject to the requirement that "the selection of the bargaining representative remains free." *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, 280 (italics omitted). Since "union and employee interests are one" in the context of concerted efforts to achieve economic advantage, "it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to [the] employees." *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702, 705 (C.A. 5).

By contrast, the rights to distribute materials and to solicit support in organizing for collective bargaining are rights that individual employees exercise in choosing whether to be represented by a union, and in re-evaluating their bargaining agent. "[T]he rationale of allowing waiver * * * disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse." *National Labor Relations Board* v. *Mid-States Metal Products, Inc., supra*, 403 F. 2d at 705. Moreover, even if it could be assumed that the

union would secure economic benefits in return for the surrender of these rights, waiver would constitute an unacceptable abridgement of the basic statutory policy of protecting employees' "full freedom of association, self-organization, and designation of representatives of their own choosing" (Section 1, 29 U.S.C. 151). Since Section 7 guarantees equally the right to select or reject a bargaining agent, the Board properly held that a contractual waiver of the right to distribute literature is invalid both as to supporters, and opponents, of the incumbent union.

There is no merit to the Company's suggestion that the Board should have balanced the availability of alternative channels of employee communication against a legitimate employer business justification for the no-distribution rule, since there is no evidence that the rule was needed to maintain production or discipline. Nor did the Board place impermissible limits on the parties' freedom of contract. Where, as here, the parties have agreed to restrict statutory rights in a manner inconsistent with employee freedom of choice, the Board may require the parties to cease enforcing the unlawful portion of their agreement. Finally, the Company incorrectly contends that this case does not involve a restriction on the employees' right to distribute literature concerning the selection or rejection of a bargaining representative because the literature to be distributed here was a union leaflet. It is undisputed that the Company's rule barred all distribution on the premises, and that the rule was consistently enforced (with rare exceptions not

relevant here). In these circumstances, it is plain that the rule would have barred the distribution of union literature relevant to the selection or rejection of a bargaining representative.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT THE COLLECTIVE BARGAINING REPRESENTATIVE MAY NOT WAIVE THE EMPLOYEES' RIGHT TO DISTRIBUTE UNION LITERATURE DURING NON-WORKING TIME IN NON-WORKING AREAS OF THE PLANT

Sections 7 and 8(a)(1) of the Act guarantee employees the right to organize and bargain collectively through representatives of their own choosing, or to refrain from such activities, free from employer interference. Implicit in that guarantee is the right to select or reject a bargaining representative and to communicate freely concerning that choice. Since the plant is the "place uniquely appropriate" for the exchange of employee views and information, a ban on the distribution of union literature, or on the solicitation of union support, by employees at the plant during non-working time constitutes an interference with the employees' right to organize guaranteed by Section 7. *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 801, n. 6, 803. Such a ban "must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline" (*id.* at 803–804, n. 10).

There is no contention here that considerations of production or discipline make the Company's no-distribution rule necessary. The sole issue presented is whether the Board properly concluded that the statutory guarantee of employee free choice and expression prevent a legitimate waiver of those rights by the collective bargaining representative. The Board's conclusion is correct and should be upheld by this Court.

1. In furtherance of the Act's policy of "encouraging the practice and procedure of collective bargaining" (Section 1, 29 U.S.C. 151) and pursuant to the principle of "majority rule" embodied in Section 9(a) (29 U.S.C. 159(a)), the representative selected by a majority of the employees in an appropriate unit is empowered, as part of the economic bargain struck with the employer in the collective agreement, to waive certain rights which the individual employees might otherwise have. See *J. I. Case Co.* v. *National Labor Relations Board,* 321 U.S. 332, 338–339. Thus, the union designated by employees as their agent is authorized not only to negotiate their wages and other conditions of employment, but also to waive such statutory rights as the right to strike or the right to bargain about subjects within the area of mandatory bargaining. *Mastro Plastics Corp.* v. *National Labor Relations Board,* 350 U.S. 270, 279–284; *Timken Roller Bearing Co.* v. *National Labor Relations Board,* 325 F. 2d 746, 750–751 (C.A. 6), certiorari denied, 376 U.S. 971; *National Labor Relations Board* v. *Item Co.,* 220 F. 2d 956, 958–959 (C.A. 5), certiorari denied, 350 U.S. 836.

Waiver of these rights is permitted because they depend on collective action for their effectiveness, and the union is the arbiter of such action.* Moreover, the interests of the union and the employees in the economic arena normally coincide, and "it can fairly be assumed that employee rights will not be surrendered except in return for bargained-for concessions from the employer of benefit to employees." *National Labor Relations Board* v. *Mid-States Metal Products, Inc.*, 403 F. 2d 702, 705 (C.A. 5). For example, once the union has reached agreement with the employer on wages and other employment benefits, it may appropriately waive the employees' right to strike during the term of the agreement as the *quid pro quo* for the employer's acceptance of a mandatory grievance and arbitration procedure as the mechanism for enforcing the contractual benefits provided. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 455.

In *Mastro Plastics Corp.* v. *National Labor Relations Board, supra,* however, the Court emphasized that contractual waivers of the right to strike rest on the "premise of fair representation" and that such clauses promote the flow of commerce "[*p*]*rovided the selection of the bargaining representative remains free*" (350 U.S. at 280, emphasis in original). The Court, therefore, refused to interpret a union's agree-

*However, the union's bargaining authority is limited by the duty of fair representation; the union may make only rational and lawful distinctions among the employees it represents. *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192, 203–204; *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338; *Truck Drivers and Helpers, Local 568* v. *National Labor Relations Board*, 379 F. 2d 137, 142–143 (C.A. D.C.).

ment to refrain from " 'any strike' " during the term of the contract as a waiver of the employees' right to strike "against unlawful practices destructive of the foundation on which collective bargaining must rest" (*id.* at 281). In the Court's view, "the contract, taken as a whole, deal[t] solely with the economic relationship between the employers and their employees"; it did not constitute a waiver of the right to strike against flagrant employer interference "with the expressly protected right of * * * employees to select their own bargaining representative" (*id.* at 281; 278).

Similar considerations support the Board's refusal here to uphold a contractual waiver of the employees' right to distribute literature relating to their selection or rejection of a bargaining representative. As the Fifth Circuit stated in *National Labor Relations Board* v. *Mid-States Metal Products, Inc., supra,* 403 F. 2d at 705:

> The rights to distribute materials and solicit in organizing for collective bargaining are rights of individual employees, relating to their selecting (or choosing not to select) and constantly re-evaluating their collective bargaining agent. They are to be distinguished from rights which employees acting in concert, through the collective bargaining agent, may exercise in attempts to achieve economic advantage. * * *

Waiver is permissible in the economic area because it can fairly be assumed that the union will not agree to waive the employees' rights without securing substantial concessions on their behalf from the employer. The Fifth Circuit noted, however, that this rationale

> * * * disappears where the subject matter waived goes to the heart of the right of employees to change their bargaining representative, or to have no bargaining representative, a right with respect to which the interests of the union and employees may be wholly adverse. Solicitation and distribution of literature on plant premises are important elements in giving full play to the right of employees to seek displacement of an incumbent union. We cannot presume that the union, in agreeing to bar such activities, does so as a bargain for securing other benefits for the employees and not from the self-interest it has in perpetuating itself as bargaining representative. [*Mid-States, supra,* 403 F. 2d at 305.]

Moreover, even if the union secured some bona fide employee benefits from the employer in return for agreeing to a ban on in-plant solicitation and literature distribution, it is unlikely that those benefits could adequately compensate for the impairment of employee rights which would result from the ban. Cf. *National Labor Relations Board* v. *Erie Resistor Corp.,* 373 U.S. 221, 231–236. The employees' right to make a free choice respecting the selection or retention of a bargaining representative can be effectively exercised only if the employees are well informed on matters relevant to that choice, and the plant is the "place uniquely appropriate" for employees to obtain this information.

The impairment of this political right of free choice resulting from a ban on in-plant union solicitation and literature distribution could not be offset by a solely

economic gain such as an increase in wage rates. Nor would a bulletin board privilege, similar to that obtained by the Union here (*supra*, p. 3), adequately substitute for in-plant union solicitation and literature distribution by the employees. An incumbent union's bulletin board could hardly be used to promote the communication of opposing views, particularly where, as here, the employer reserved the right to reject "controversial" notices (*supra*, p. 3).

2. In view of the foregoing considerations, the Board reasonably concluded that the Act's policy of protecting employees' "full freedom" in the "designation of representatives of their own choosing" (Section 1, 29 U.S.C. 151) prevents the bargaining representative from waiving the right of opposing employees to in-plant distribution of literature relevant to the replacement or rejection of that representative. Given the impropriety of permitting the incumbent representative to waive the rights of its employee opponents, the Board also reasonably concluded that it is equally improper to permit it to waive the rights of its employee supporters. Any other position would create an unfair situation in which employees opposing the incumbent representative could distribute literature within the plant attacking the incumbent, while its supporters would be prevented from responding. Accordingly, the Board correctly permitted the Union, even though it had agreed to the contract waiver originally, to challenge the validity of that waiver on behalf of all the employees whom it represented; the Board's order protects literature distribu-

tion on behalf of, or in opposition to, any labor organization (Pet. App. 25).[9]

---

[9] In concluding that the rights of supporters of the incumbent representative merit as much protection as do those of its opponents, the Board drew on the experience provided by prior litigation (Pet. App. 22–24). Thus, as initially stated in *Gale Products*, *supra*, the Board's position was that "neither an employer nor an incumbent union is entitled, absent special circumstances * * *, to freeze out another union by trenching on statutory rights of employees to engage in protected activities" (142 NLRB at 1249). Consequently, the Board set aside the contractual limitation only insofar as it prohibited the distribution of literature on behalf of a labor organization other than the contracting union (*ibid.*). However, in *General Motors Corp.*, 147 NLRB 509, Member Jenkins indicated that he would "go further and hold that such a contractual prohibition of organizational activity is also invalid as applied to employees who are members or supporters of the contracting union" (*id.* at 514, concurring and dissenting opinion). Pointing to the concern for employee organizational rights expressed in the Act, Member Jenkins stated (*ibid.*):

> These rights, in my view, are so fundamental that I am unwilling to hold that they can be waived or bargained away by a union for the employees generally or for any specific group of employees. Except where legitimate reasons for interference with those basic rights have been established—and none is present here—I think employees have, and should have, the right to assist and support labor organizations of their own choosing irrespective of whether the labor organization is an incumbent or a rival one. The purposes of the Act, in my view, are not furthered by the denial to any employees of their basic statutory rights.

The Sixth Circuit, in denying enforcement of the Board's order in *Armco Steel Corp.* v. *National Labor Relations Board*, *supra*, relied in part on the fact that (344 F. 2d at 624):

> Under Section 9 of the Act the collective bargaining representative was the exclusive representative of *all* the employees, which included dissident as well as those who were loyal to the incumbent. It was the Board who divided Arm-

3. (a) The Company contends that the Board erred in failing to consider the availability of alternative channels of employee communication in this case (opposition to certiorari pp. 9–10, 15–17). But "[n]o restriction may be placed on the employees' rights to discuss self-organization among themselves [in the plant], unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. *Republic Aviation Corp.* v. *Labor Board,* 324 U.S. 793, 803." *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 113. Here, the trial examiner found that "no evidence of necessity whatsoever has been shown" (Pet. App. 40). Accordingly, there is no occasion to balance the availability of alternative channels of communication for the employees against a legitimate employer business justification for a rule barring in-plant communication, since no such justification has been demonstrated. See *National Labor Relations Board* v. *United Aircraft*

---

co's employees into two classes and held the collective bargaining agreement invalid as to dissident and valid as to loyal employees supporting that representative. The purpose of the National Labor Relations Act is to promote industrial peace. Policy making decisions of the Board favoring employees supporting a rival union over those loyal to the incumbent would seem to us to have the opposite effect.

In *Int'l Assoc. of Machinists* v. *National Labor Relations Board,* 415 F. 2d 113, the Eighth Circuit, while agreeing with the Fifth Circuit's decision in *Mid-States Metal, supra,* that the organizational rights at issue here are too fundamental to be contracted away by the union, enlarged the Board's order to insure employees the right to distribute literature "on behalf of any labor organization or in any opposition to any labor organization" (*id.* at 116). In this case, the Board has adopted the position of Member Jenkins and of the Eighth Circuit.

Corp., 324 F. 2d 128 (C.A. 2), certiorari denied, 376 U.S. 951. Cf. *McDonnell Douglas Corp.* v. *National Labor Relations Board*, 472 F. 2d 539, 545–546 (C.A. 8) (employer made "a creditable showing of special, justifying circumstances" for rule limiting off-duty employees' access to plant premises).[10]

(b) In its brief below (p. 18), the Company stressed the "extreme importance of freedom of contract and the impropriety of Board interference with that freedom," citing *H. K. Porter, Inc.* v. *National Labor Relations Board*, 397 U.S. 99. *Porter*, however, held only that the Board did not have the power to compel an employer to agree to a substantive contractual provision about which he had unlawfully refused to bargain. The decision in *Porter* specifically recognizes that the Act imposes limits on the parties' freedom of contract. 397 U.S. at 108, n. 6. Where the parties have agreed to a provision which limits statutory rights in a manner inconsistent with employee

[10] The importance to employees of the right to communicate within the plant during non-working time becomes even more important as employees live farther from the plant, causing more automobile commuting and attendant difficulties in plant-gate distribution. See *National Labor Relations Board* v. *United Aircraft Corp.*, *supra*, 324 F. 2d at 130; Union's memorandum in support of the petition, p. 6. The evidence in this case showed that the same or similar problems made alternative methods of communication inadequate here (Pet. App. 38–39; A. 87–90, 92–94, 99–101, 103). The Company's reliance (opposition to certiorari, p. 15) on *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615, is misplaced. That case merely held that in-plant distribution by employees can be restricted to non-working areas without significantly diminishing the employees' opportunity to communicate—a view followed by the Board here (Pet. App. 25).

freedom of choice, they have moved outside the area of fair exchange in collective bargaining and into direct conflict with employee freedoms and with the basic policies of the Act. In such a situation the Board may require the parties to cease enforcing the unlawful portion of their agreement.[11]

(c) Nor is there merit to the Company's contention that the reasons advanced, *supra*, pp. 10–16, for not honoring the Union's waiver were inapplicable here because "the literature to be distributed did not deal with the selection or rejection of a bargaining representative * * * but was a union leaflet" (opposition to certiorari, p. 11). The record is silent on the contents of the Union's leaflet. It is undisputed that the Company's rule barred all employee distribution of union-related literature on its premises, and that the Company has consistently maintained and enforced the rule (with exceptions not relevant here), specifically applying it in the past in an organizational campaign (*supra*, pp. 3–4). Moreover, in denying the Union's requests to revoke the rule and permit employees to distribute union literature in non-working areas on their own time, the Company did not suggest that its refusal to permit distribution of the union leaflet was based on its contents; rather it took the position that any in-plant distribution of literature

---

[11] See *National Labor Relations Board* v. *Rockaway News Co.*, 345 U.S. 71, 79; *Great Lakes Carbon Corp.* v. *National Labor Relations Board*, 360 F. 2d 19, 22 (C.A. 4); *Meat and Highway Drivers Local 710* v. *National Labor Relations Board*, 335 F. 2d 709, 717 (C.A.D.C.).

was prohibited (*supra*, pp. 4–5). In these circumstances, the rule would deter employees from distributing, and would, in fact, have been applied by the Company to bar the distribution of, all literature relevant to the selection or rejection of a bargaining representative."

In sum, the Board reasonably concluded that the employees' right to receive and communicate information necessary to the intelligent exercise of their free choice concerning a bargaining representative outweighed any legitimate reasons for permitting the incumbent representative to waive that right. In reaching a contrary conclusion, the court below thus impermissibly intruded upon the Board's function of striking a balance among "conflicting legitimate interests" which will "effectuate national labor policy." *National Labor Relations Board* v. *Truck Drivers Union*, 353 U.S. 87, 96; see also *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236.

---

[11] The protection afforded employees under the Board's order applies only to non-working time and only to the distribution of literature "on behalf of any labor organization relating to the selection or rejection of a labor organization as the exclusive bargaining agent of the employees * * *, or other matters related to the exercise by employees of their Section 7 rights" (Pet. App. 25). Cf. *Mason and Hanger-Silas Mason Co.* v. *National Labor Relations Board*, 405 F. 2d 1, 5 (C.A. 5) (opposition to certiorari, pp. 10–11) (distribution of union personnel lists). Since its "holding is concerned solely with the exercise by *employees* of their Section 7 rights," the Board emphasized that "it is not to be taken as licensing in any way the distribution of institutional—as distinguished from purely organizational—literature of a labor organization which has acquiesced in an employer's promulgation or maintenance of a broad no-distribution rule" (Pet. App. 24, n. 9).

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded with instructions to enforce the Board's order.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
JOHN S. IRVING,
Deputy General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COMEN,
Deputy Associate General Counsel,
MARION GRIFFIN,
Attorney,
National Labor Relations Board.

NOVEMBER 1973.